Institut Teknologi Federal Sdn Bhd v IIUM Education Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6–24–2682 OF 2004
ABDUL MALIK ISHAK J
8 FEBRUARY 2005

Civil Procedure — Stay of execution — Application to stay order for removal of caveat — Whether special circumstances exist — Test to be applied

Contract — Formation — Terms — Sale of educational college — Whether include transfer of educational license

Land Law — Restraint on dealings — Caveat — Removal — Whether caveat should be removed — Test to be applied

The defendant, as part of its educational expansion plans intended to expand its International Islamic College ('the IIC') to cater for more students of higher learning. The plaintiff was a company that runs an educational college and the registered owner of a piece of land together with all the buildings erected thereon wherein the plaintiff's college — the Federal Institute of Technology ('FIT') — stood ('the property').

By way of an advertisement, the plaintiff was desirous of selling the property wherein the FIT stood and offered it for sale. The terms and conditions of the sale of the property wherein the FIT stood were stated in an advertisement. The defendant was desirous of purchasing the property and so, after negotiations, the principal terms were agreed upon. Part payment was eventually paid by the defendant. The defendant then made preparations to recruit students and lecturers as part and parcel of the expansion programmes of IIC. However in the course of drafting the sale and purchase agreements, dispute as to the transfer of the plaintiff's educational license to the defendant arose. The plaintiff claimed that reference to the license constituted a new term and proceeded to forfeit the part payment paid. Subsequently, the defendant lodged a private caveat on the property.

In the meantime, the plaintiff entered into a sale and purchase agreement with a third party ('MSC') for the sale and purchase of the same property. Upon execution of this sale and purchase agreement, the parties proceeded to effect a transfer of the property to MSC and thus present the documents for registration the land office. Having discovered the defendant's caveat on the property, the plaintiff applied to remove the caveat which was allowed by the court. The defendant appealed to the Court of Appeal. This application by the defendant at this court sought for a stay of the order for the removal of the caveat until the disposal of the appeal.

Held, allowing the application for stay of order of removal of caveat on the property:

(1) In considering whether to grant a stay of execution, the court is to apply the test of 'special circumstances'. The 'nugatoriness' of an appeal is a species of the 'special circumstances' test and not a separate test by itself. So, if the defendant was able to show that a refusal of the stay would render any further successful appeal nugatory, this would certainly constitute 'special circumstances' (see para 21). The key issue is in relation to the enforcement of any judgment and not in regard to the merits of the case (see para 24); *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 followed. The court will consider the special circumstances approach: (1) in the event the stay was not granted, a successful appeal would be rendered nugatory; (2) in the event the stay was not granted, the substratum of the appeal would be destroyed; and (3) in the event the stay was not granted, the defendant would suffer serious and irreparable damage (see para 22).

(2) If this transfer is allowed to be registered unimpeded, then a successful appeal would be rendered nugatory because the defendant would not be able to obtain a property of a similar nature as the one at hand having all the necessary approvals and licenses for running a college (see para 26). Also if the stay is not granted, and the property wherein the FIT stood as well as the licenses are legally transferred to MSC, this by itself would defeat the very substratum of the appeal to the Court of Appeal. The key factor that will render any successful appeal nugatory would be the subject matter of the dispute itself — ie the land and the buildings and the licenses thereto. The only remedy available to the defendant would be to secure the subject matter of the dispute — the property and the licenses thereto in accordance with the agreement and nothing else (see para 27). Indeed if the appeal was unsuccessful, the plaintiff could easily be compensated by way of damages. All these factors constituted special circumstances warranting a stay (see para 56).

(3) The defendant had alluded to the 'serious or irreparable injury' that the defendant would sustain if the stay was not granted, in that the defendant had increased its intake of students and recruitment of lecturers in anticipation of its purchase of the property and that it was difficult for the defendant to accommodate them in its present premises. Also it was next to impossible to find a college of that size and magnitude with the same facilities and the relevant licenses and approvals located in Kuala Lumpur for purchase. All these clearly showed that the defendant had succeeded in showing the existence of special circumstances to warrant a stay (see para 31); *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 followed.

(4) The defendant need not have an actual interest in the land for it to have a caveatable interest. An interest that has not arisen yet is sufficient to constitute caveatable interest (see para 36).

(5) The defendant had explained as to why there was a need to purchase the property. In sharp contrast, the plaintiff was merely concerned with pecuniary profit. The sale to MSC would benefit the plaintiff an additional sum of RM3.4 million. The balance of convenience must surely fall in favour of the defendant (see para 49).

(6) The plaintiff's conduct had caused the defendant to believe that the sale was going to proceed and that the license was an integral part of the deal. Having induced the defendant to pay the deposit and having agreed to the principal terms of the agreement and after representing that the sale would include the license, the plaintiff now resiled from its commitment. Of course, the defendant having placed its reliance on the plaintiff's promises had increased its enrolment of students and recruitment of lecturers in anticipation of the purchase and had taken the necessary steps to commence its courses at the FIT college. All these facts would give rise to an estoppel and the plaintiff should be prevented from resiling from its obligations (see para 53).

(7) The requirement of the license was not an afterthought. The license issue was a live issue and it started at the very commencement of the negotiations between the parties. The advertisement itself made references to 'facilities approved for educational purposes'. The offer was not limited to the physical part of the subject matter — referring to the land, the buildings wherein the FIT stood, but also to an approval from an external source going to the very character of the subject matter and that was this: that it was licensed for educational purposes. It was the plaintiff who later resiled from its position *vis-a-vis* the advertisement which precipitated the entire dealings between the parties (see para 59).

[**Bahasa Malaysia summary**

Defendan, sebagai sebahagian daripada pelan pengembangan pendidikan pelajaran berniat untuk mengembangkan International Islamic College ('IIC') supaya dapat memenuhi keperluan lebih ramai pelajar bagi tujuan pelajaran tinggi. Plaintif merupakan sebuah syarikat yang menjalankan sebuah kolej pelajaran dan pemilik berdaftar sebuah tanah bersama dengan bangunan-bangunan di atas tanah itu di mana kolej plaintif — Federal Institute of Technology ('FIT') — berdiri ('tanah itu'). Melalui pengiklanan, plaintif berhasrat menjual tanah itu di mana FIT berdiri dan membuat tawaran untuk penjualan. Terma-terma dan syarat-syarat penjualan harta di mana FIT berdiri telah dinyatakan dalam pengiklanan tersebut. Defendan pula berhasrat untuk membeli harta itu dan selepas perundingan, terma-terma telah dipersetujui oleh kedua-

dua pihak. Sebahagian pembayaran di bayar oleh defendan. Defendan seterusnya membuat persiapan untuk rekrut pelajar-pelajar dan pensyarah-pensyarah sebagai sebahagian daripada pelan pengembangan pendidikan pelajaran IIC. Walau bagaimanapun dalam semasa menyediakan perjanjian jual beli, pertikaian telah timbul berkenaan pindahmilik lesen pelajaran plaintif kepada defendan. Plaintif menuntut bahawa rujukan kepada lesen merupakan satu terma baru dan terus melucuthak sebahagian pembayaran yang telah dibayar. Berikutannya defendan memasukkan satu kaveat persendirian ke atas hakmilik tanah tersebut.

Pada masa yang sama, plaintif telah memasuki satu perjanjian jual beli dengan pihak ketiga ('MSC') untuk tujuan jual beli tanah itu. Setelah melaksanakan perjanjian jual beli itu, pihak-pihak mengambil langkah untuk melaksanakan pemindaan tanah itu atas nama MSC dan menyerahkan dokumen-dokumen untuk pendaftaran di pejabat tanah. Setelah mendapat tahu mengenai kaveat ke atas tanah itu, plaintif membuat aplikasi untuk mengeluarkan kaveat itu dan mahkamah telah membenarkan aplikasi ini. Defendan merayu kepada Mahkamah Rayuan. Aplikasi oleh defendan kepada mahkamah ini adalah untuk pergantungan perintah bagi mengeluarkan kaveat sementara menunggu pelupusan rayuan.

Diputuskan, membenarkan permohonan penggantungan perintah bagi pengeluaran kaveat ke atas hartanah:

(1) Di dalam menentukan sama ada membenarkan penggantungan pelaksanaan, mahkamah mengguna pakai ujian 'special circumstances'. 'Nugatoriness' sesuatu rayuan adalah spesies ujian 'special circumstances' dan bukan merupakan ujian berasingan dengan sendirinya. Oleh itu, sekiranya defendan mampu untuk menunjukkan bahawa penafian penggantungan akan menyebabkan rayuan selanjutnya yang berjaya tidak berguna, ini sememangnya mewujudkan 'special circumstances' (lihat perenggan 21). Isu utama adalah berkenaan dengan penguatkuasaan sebarang penghakiman dan bukanlah merit suatu kes (lihat perenggan 24); *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 diikut. Mahkamah akan mengambil kira pendekatan keadaan-keadaan istimewa; (1) sekiranya penggantungan tidak diberikan, rayuan yang berjaya akan menjadi tidak berguna, (2) sekiranya penggantungan tidak diberikan, asas kepada rayuan akan dimusnahkan; and (3) sekiranya penggantungan tidak diberikan, defendan akan mengalami kerugian yang serius dan tidak boleh dibaiki lagi (lihat pereggan 22).

(2) Sekiranya pemindahan ini dibenarkan untuk didaftarkan tanpa halangan, maka suatu rayuan yang berjaya akan menjadi tidak berguna kerana defendan tidak berupaya untuk mendapatkan suatu hartanah yang bersifat sama seperti yang ada di dalam pegangan sesudah mendapatkan kelulusan-kelulusan dan lesen-lesen untuk mengusahakan sesuatu kolej (lihat perenggan 26). Juga, sekiranya penggantungan tidak diberikan,

dan hartanah di mana FIT berdiri dan begitu juga lesen-lesen dipindahkan secara sah kepada MSC, ini dengan sendirinya menggagalkan asas rayuan kepada Mahkamah Rayuan. Faktor utama yang akan menjadikan rayuan yang berjaya sebagai tidak berguna adalah perkara pokok kepada pertikaian itu sendiri — iaitu tanah dan bangunan-bangunan dan lesen-lesen. Satu-satunya remedi yang dipunyai oleh defendan adalah mendapatkan perkara pokok kepada pertikaian — hartanah tersebut dan lesen-lesen yang ada berdasarkan perjanjian dan tidak lebih daripada itu (lihat perenggan 27). Malahan sekiranya rayuan tidak berjaya, plaintif akan diberi pampasan secara ganti rugi. Kesemua faktor-faktor ini mewujudkan keadaan-keadaan istimewa yang mewajarkan penggantungan (lihat perenggan 56).

(3) Defendan telah menyebutkan 'serious or irreparable injury' yang akan ditanggung oleh defendan sekiranya penggantungan tidak dibenarkan, di mana defendan telah menambah pengambilan pelajar-pelajarnya dan penggajian pensyarah-pensyarah atas tanggapan pembelian hartanah tersebut dan ia akan menyusahkan defendan untuk menempatkan mereka di premis yang sedia ada. Juga adalah perkara yang mustahil untuk mendapatkan pembelian sebuah kolej yang sama saiznya dan kepentingannya dengan kemudahan yang sama dan lesen-lesen yang berkaitan dan persetujuan-persetujuan yang terletak di Kuala Lumpur. Kesemua ini dengan jelasnya menunjukkan bahawa defendan telah berjaya menunjukkan kewujudan keadaan-keadaan yang istimewa yang mewarankan penggantungan (lihat perenggan 31); *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 diikut.

(4) Defendan tidak perlu mempunyai kepentingan sebenar ke atas tanah tersebut untuk mempunyai kepentingan kaveat. Suatu kepentingan yang belum lagi wujud adalah mencukupi untuk mewujudkan kepentingan kaveat (lihat perenggan 36).

(5) Defendan telah menerangkan kenapa terdapatnya keperluan untuk membeli hartanah tersebut. Berlainan sekali, plaintif hanya memikirkan keuntungan kewangan. Penjualan kepada MSC akan memberi faedah kepada plaintif jumlah tambahan sebanyak RM3.4 juta. Keseimbangan kesenangan mestilah berpihak kepada defendan (lihat perenggan 49).

(6) Tindakan plaintif telah menyebabkan defendan percaya bahawa jualan akan diteruskan dan lesen adalah suatu bahagian yang penting kepada perjanjian itu. Dengan mendorong defendan untuk membayar wang pendahuluan dan dengan bersetuju kepada terma-terma utama perjanjian itu dan selepas memberi representasi bahawa jualan itu adalah berserta lesen, plaintif sekarang ini menarik diri daripada komitmennya. Sudah tentu, defendan dengan bersandarkan kepada janji-janji plaintif, telah menambahkan pengambilan pelajar-pelajarnya dan penggajian pensyarah-pensyarahnya atas tanggapan pembelian itu dan telah mengambil langkah-langkah yang perlu untuk memulakan kursus-kursusnya di Kolej FIT.

Kesemua fakta ini mewujudkan suatu estopel dan plaintif seharunya dihalang menarik diri daripada tanggung jawabnya (lihat perenggan 53).

(7) Keperluan lesen bukanlah merupakan sesuatu yang difikirkan kemudian. Isu lesen adalah isu hidup dan ia bermula daripada permulaan perbincangan di antara kedua-dua pihak. Iklan itu dengan sendirinya merujuk kepada 'facilities approved for educational purposes'. Tawaran itu tidak dihadkan kepada bahagian fizikal perkara pokok itu — merujuk kepada tanah, bangunan-bangunan di mana terdirinya FIT, tetapi juga kepada kelulusan daripada punca luaran kepada perkara asas pokok iaitu: bahawa ia dilesenkan bagi tujuan-tujuan pendidikan. Plaintiflah yang kemudiannya telah menarik diri daripada kedudukannya berkenaan dengan iklan yang mengakibatkan keseluruhan urusan di antara kedua-dua pihak (lihat perenggan 59).]

Notes

For cases on restraint on dealings, caveats, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3015–3312.
For cases on stay of proceedings generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4272–4332.
For cases on terms in the for0mation of a contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2204–2205.
For removal of the caveat, see 8 *Halsbury's Laws of Malaysia*, paras [150.230].

Cases referred to

Ajaib Singh v Jeffrey Fernandez [1971] 1 MLJ 139 (refd)
Bank Utama (M) Bhd v Periamma a/p Vellasamy [2002] 7 MLJ 250 (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd [2004] 4 MLJ 259 (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)
Faulke's Caveat, Re (1906) 26 NZLR 392 (refd)
Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd [2003] 3 MLJ 152 (refd)
Ker Chee Chuan v Katlyn Enterprise (M) Sdn Bhd [1990] 2 MLJ 91 (refd)
Kho Ah Soon v Ooi Kar Seng (Properties) Sdn Bhd [1995] 3 MLJ 293 (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257 (folld)
Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263 (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)
Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53 (refd)
Mahadevan & Anor v Patel [1975] 2 MLJ 207 (refd)
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (folld)
N Vangedaselam v Mahadevan & Anor [1976] 2 MLJ 161 (refd)
Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145 (refd)
Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224 (refd)

Perwira Affin Bank Bhd v KI Production Sdn Bhd [2000] 4 MLJ 652 (refd)
J Raju v Kwong Yik Bank Bhd & Anor [1994] 2 MLJ 408 (refd)
Ramalingam a/l Rasaratnam v Sellam w/o Nadarajan [2004] 6 MLJ 182 (refd)
RHB Sakura Merchant Bankers Bhd v Tan Sri Dato' Ting Pek Khiing (No 2) [2004] 2 MLJ 315 (refd)
See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (refd)
T Damodaran v Choe Kuan Him [1979] 2 MLJ 267 (refd)
Tan Suan Heoh v Lim Teck Ming & Ors [1987] 2 MLJ 466 (refd)
Tee Chin Yong v Ernest Jeff [1963] MLJ 118 (refd)
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113 (refd)
Yeow & Foo Sdn Bhd v Peninsular Rank Sdn Bhd [1994] MLJU 125 (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92
National Land Code ss 214A, 323, 324(1), 327, 329
Private Higher Educational Institutions Act 1996 ss 6, 7, 19
Specific Relief Act 1950 s 11(2)

Bharti Seth (Sumathi Krishnan with her) (Bharti Seth & Assoc) for the plaintiff.
Watson Peters (Amerjit Singh with him) (Watson Peters & Mohd Fuad) for the defendant.

Abdul Malik Ishak J:

SUMMONS IN CHAMBERS IN ENCL 11

[1] By way of encl 11, the defendant sought for the following orders:

(1) An order for a stay of the enforcement and/or the operation of the Order given by the S1 judge on 31 December 2004 for the removal of a private caveat lodged by the defendant vide presentation No 16005/2004 until the disposal of the appeal or further order of the court.

(2) That the registrar of titles be hereby ordered not to remove the said caveat until the final disposal of the appeal or further order of the court.

(3) That the costs of this application be costs in the cause.

(4) Such further or other relief that this honourable court deems fit to grant.

FACTS OF THE CASE

[2] The defendant is a wholly owned subsidiary of IIUM Holdings Sdn Bhd, which in turn, is wholly owned by the International Islamic University (hereinafter will be referred to as 'the *said University*'). The said University, as part of its educational expansion plans, were looking for ways to expand its

International Islamic College (hereinafter will be referred to as the '*IIC*') to cater for the less fortunate Form 5 school leavers who were denied entry into other institutions of higher learning.

[3] The plaintiff is a company that runs an educational college under the name of Federal Institute of Technology (hereinafter will be referred to as the '*FIT*') since 1968. The plaintiff is also the registered owner of all that piece of land held under Grant No HS (D) 83192, Lot No 12734, Mukim and Daerah Kuala Lumpur, Wilayah Persekutuan, Kuala Lumpur together with all the buildings erected thereon wherein the FIT stood (hereinafter will be referred to as 'the *said property*').

[4] It was the stand of the plaintiff that since the defendant was in the line of running and managing an educational college it ought to be fully aware of all the legal and procedural requirements of the Ministry of Education.

[5] By way of an advertisement, the plaintiff was desirous of selling the said property wherein the FIT stood and offered it for sale. The terms and conditions of the sale of the said property wherein the FIT stood can be seen in the advertisement as exhibited in *exh 'SKH–8' of encl 15 and it was worded in this way*:

College/Institutional

Premises for

SALE/LEASE

SALE:

Choice piece of Freehold Institutional Land and Building with facilities approved for Educational purposes within KL City limits for Sale. Suitable for Private Colleges looking for Expansion or New educational Projects by Public Listed companies. Ideal for Academic/Engineering/Management Training Purposes

LEASE:

Long Term Tenancy Lease between 15 to 20 years can be considered. Interested/ Genuine Enquiries to:

Advertiser
GPO Box 11016
Kuala Lumpur
Email: business 2003_3@hotmail.com
For direct enquiries only
Tel: 012–307 8340

[6] *Of course, the defendant was desirous of purchasing the said property* wherein the FIT stood and so, after negotiations, the principal terms were agreed upon. The price agreed upon was RM16.5 million and part payment was eventually paid by the defendant to the tune of RM330,000. The defendant then made

preparations to recruit students and lecturers as part and parcel of the expansion programmes of IIC. It was said that there were hundreds of students on the waiting list waiting to be enrolled in IIC. New courses were introduced by IIC.

[7] Having received the part payment, the plaintiff then proceeded to prepare the first draft agreement and labelling it as the '*final draft*'. Upon perusal of the '*final draft*', the defendant was surprised that the essential term of the transfer of the license was not mentioned at all. On the defendant's request to incorporate a term allowing for the transfer of the license to the defendant, the plaintiff dismissed that request on the ground that it was an introduction of a new term. The stand of the defendant was this. That the license should also be transferred to the defendant. At this juncture, it would be ideal to refer to the relevant correspondences. For starters, reference to the letter dated 16 June 2003 by the defendant confirming that the education license was part and parcel of the sale as reflected in *exh 'SKH–9' of encl 15 should be made and it was worded in this way*:

IIUM EDUCATION SDN BHD
(Formerly known as IIUM Educational & Cultural Development Sdn Bhd)
(Company No 453541–X)
Susidiary of IIUM Holdings Sdn Bhd

16 June 2003

En Abdullah Fauzi Ibrahim
Director
Corporate Affairs & Services
26, Jalan Vivekananda
50470 Kuala Lumpur

Dear Sir,

RE: MEETING ON 13 JUNE 2003

Referring to the above meeting, we would like to confirm that you would provide us with (the) amount of the leasing liability for computers and (the) list of furniture and fittings located in the premises.

We also confirm that we have agreed that the Education License is to be transferred to us.

Your cooperation is highly appreciated. Wassalam. Yours faithfully,

Sgd (Illegible)

SHAMSUL KAHAR HARON

General Manager

[8] *The reply from the plaintiff dated 17 June 2003 allowing for the takeover of the licence was worded in this way and this can be seen in exh 'SKH–10' of encl 15*:

FIT

Institut Teknologi Federal Sdn Bhd Kuala Lumpur — Malaysia

To,

Encik Shamsul Kahar Haron,
General Manager
IIUM Education Sdn Bhd BY HAND

17 June 2003

Dear Sir,

Sale of FIT Premises at Taynton View

Further to our meeting on Friday, 13 June 2003, we enclose herewith the following:

1 Leasing Liability for Computers Amounting to RM35,000 as of 30 July 2003.

2 List of Furniture and Fittings and Equipments as per Locations in the premises. List of Datuk's items will be forwarded in due course.

3 Option No 3 for License

The License holder of FIT is responsible for the existing students of the Institute. We propose that if you need the License you may take over the Management of the existing students and staff immediately on signing of the S & P Agreement.

This proposal will be to your advantage as you can have possession immediately and enable you to plan your renovations and also accommodate your July 2003 intake.

Enclosed herewith is the projected income and expenditure statement for the period up to June 2004. For your information.

Note 1: You may have the option to absorb certain if not all the relevant Teaching and Admn staff into Your administration after June 2003 or alternatively terminate their services by offering them a VSS Scheme estimated to cost RM350,000. Thanking you,

Yours faithfully

Sgd (Illegible)

M Chidambaram

Manager, Accounts and Admn

[9] *This would be followed by a letter from the solicitors of the defendant dated 21October 2003* stating that the license to be included as a term of the agreement and the letter can be seen in exh 'SKH–11' of encl 15 and it was worded in this way:

A

BAHARUDDIN ALI & CO
No 5C, Tingkat 5, Kompleks MAIS
Jalan Kapar, 41400 Klang, Selangor Darul Ehsan,
Tel: 603–3343 0695/7 Faks: 603–3343 0733

Your Ref: KLR/16352/02/(Dtk)

B

Our Ref: BC–KIXS/3099/2003/PJB

Date: 21 October 2003

SYARIKAT KL REKHRAJ
Advocates & Solicitors

C

7th Floor, Wisma Gurcharan
No 71–75, Jalan Tuanku Abdul Rahman
50100 Kuala Lumpur

(Attn To: Yg Bhg Datuk KL Rekhraj)

D

BY POST/FAX

Dear Yg Bhg Datuk,

We refer to Yg Bhg Datuk's letter dated 20 October 2003.

E

We have on the 20 October 2003 receive(d) instructions from our Client pertaining to the draft copy of the Agreement. The comments and proposals (by) virtue of the draft copy of the Agreement are as per below:

1 Clause 2.1 under subtitle 2. *Payment of the Balance of Purchase Price*: Our Client request that the balance of purchase price amounting to RM16,170,000 shall be paid on or before 31 January 2004;

F

2 Subtitle 17.1 *under clause 17 — Inspection of the said Property and Subtitle 23.1 under Clause 23 — Vendor's Risk:*

G

Notwithstanding Clause 17.1, Clause 23 should be read together and kindly attach the List of Equipments and Facilities which has been given by the management of FIT inside the Sale & Purchase Agreement and to add 'the items in Pursuant to Recital G of the Agreement shall be replaced or made good by the Vendor if found to be lost, destroyed, vandalised or whatsoever in accordance with the provision, the Agreement at the date of the delivery of vacant possession'; and

3 To add in the Clause regarding 'the Duty of Vendor with regards to the Transfer of FIT Permit to the Purchaser'.

H

Your cooperation in this matter is much appreciated. Thank you.

Yours faithfully,

For BAHARUDDIN ALI & CO

I

Sgd (Illegible)

cc

En Shamsul Kahar Haron
IIUM Education Sdn Bhd,
Level 3, Administration Building Central Complex,
International Islamic University Malaysia Jalan Gombak, 53100 Kuala Lumpur

[10] *By way of a response, the plaintiff's solicitors replied and claimed that* reference to the license constituted a new term and proceeded to forfeit the part payment in the sum of RM330,000 and this can be seen in exh 'SKH–12' of encl 15 and it was worded in this fashion:

SHARIKAT KL REKHRAJ
PEGUAMBELA DAN PEGUAMCARA/ADVOCATES & SOLICITORS
7th FLOOR, WISMA GURCHARAN
NO 71–75 JALAN TUANKU ABDUL RAHMAN 50100 KUALA LUMPUR

27 November 2003

M/s Baharuddin Ali & Co
Advocates & Solicitors
No 5C, Tingkat 5,
Kompleks MAIS
Jalan Kapar
41400 Klang

Dear Sirs,

Re: Sale of freehold land held under HS (D) 83192 Lot No 12734 Mukim & District of Kuala Lumpur
Vendor: Institut Teknologi Federal Sdn Bhd
Purchaser: IIUM Education Sdn Bhd

We refer you to your letter dated 21 November 2003, upon which we have our clients' instructions that the sale by them to your clients is of the land and building thereon in the very state of repair 'As is where is' and the full purchase price is to be payable by 30 November 2003 with an extended period to 31 December 2003.

In the circumstances, it serves no purpose in holding a further meeting as all the terms and conditions for the sale have been spelt out in the draft Sale and Purchase Agreement sent to yourselves on 9 September 2003; with no comments by your clients other than to introduce new terms, inter alia, the FIT license; which your clients well know is not the subject of transfer.

Our clients regret that in the circumstances your clients having failed to sign the Agreement, our clients are forfeiting the deposit.

Yours faithfully

Sgd (Illegible)

cc Client (Post & Fax to: 22743409)

[11] *These correspondences were certainly thought provoking and they* served as interesting reading materials. They too assisted me in adjudicating encl 11.

[12] Negotiations between the parties continued unabated. The statutory declaration of Tan Sri Sanusi Junid as reflected in exh 'SKH–13' of encl 15 showed the intensity of the negotiations. *It would be ideal to reproduce the statutory declaration of Tan Sri Sanusi Junid and I shall do so forthwith*:

STATUTORY DECLARATION

I, TAN SRI DATO' SERI SANUSI JUNID (I/C NO 430710–02–5051) of No 3, Lorong Batai Dalam, Damansara Heights, 50490 Kuala Lumpur do solemnly and sincerely declare that:

(1) I am the President of the International Islamic University the ultimate beneficial owner of the College known as International Islamic College.

(2) In respect of the intended purchase of the College known as Federal Institute of Technology by IIUM Education Sdn Bhd, I wish to state that I have personal knowledge of the matters stated herein.

(3) After the plaintiff had evinced its intention (to) forfeit the deposit paid on the grounds that the defendant had 'failed' to sign the agreement, I had a number of meetings with Dato EPD Samuel and his friend and/or agent, one MissMeeta. These meetings were on or about December 2003 and January/ February 2004.

(4) I informed him that IIUM Education Sdn Bhd did not 'fail' to sign the agreement but that the transfer of (the) license was an integral part of the agreement. I explained to Dato Samuel that the defendant was desirous of completing the purchase and that the transfer of (the) license was central to the purchase and our expansion plans.

(5) Dato Samuel then promised to reconsider the matter and revert to me with his decision.

(6) Having waited for many months and not having any response from Dato Samuel, I instructed the defendant to explore its legal remedies.

I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act 1960.

Subscribed and solemnly declared)
By the abovenamed)
TAN SRI DATO' SERI SANUSI JUNID) Sgd (Illegible)
At KUALA LUMPUR)
In the State of WILAYAH PERSEKUTUAN)

This 20 DECEMBER 2004

Before me,

Sgd (Illegible)

PESURUHJAYA SUMPAH
MALAYSIA
Lot 1.28, Tkt 1, Komplek Wilayah,
2, Jalan Munshi Abdullah,
50100 Kuala Lumpur.

[13] *Since the matter was not fully settled, the defendant acting cautiously* and solely to protect its interest proceeded to lodge a private caveat on 24 November 2004 vide presentation No 16005/2004 on the said properly on which the FIT stood. According to Lord Diplock in the Privy Council in the case of *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 at 214:

> The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved.

[14] *Section 323 of the National Land Code 1965 ('NLC') sets out the* categories of persons who may enter private caveats. Not every person is allowed to enter a private caveat. Only a person who has a caveatable interest in the land is entitled to lodge a private caveat. Thus, a person who enters a private caveat must claim title to, or any registrable interest in the land or any right to such title or interest. Under s 324(1) of the NLC, the registrar is not required to enquire into the validity of the claims on which an application for entry is made. The duty of the registrar in respect of an application for entry of a private caveat is purely administrative or ministerial (*N Vangedaselam v Mahadevan & Anor* [1976] 2 MLJ 161; *Tee Chin Yong v Ernest Jeff* [1963] MLJ 118 at 119; *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 at 226; and *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267). *At this juncture, it is ideal to reproduce s 323 of the NLC. It is worded as follows*:

> (1) The persons and bodies at whose instance a private caveat may be entered are:
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
>
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
>
> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in para (b).

[15] *Now, so long as the application for the entry of a private caveat is* in the proper form duly signed, attested, verified by the statutory declaration of the applicant or his advocate and solicitor, and is accompanied by the payment of the appropriate fee, the registrar has no choice but must enter the private caveat as applied for by the applicant.

[16] So much for the law. I will now return to the narration of the facts.

[17] In the meantime, the plaintiff entered into a sale and purchase agreement on 22 June 2004 with one Macro System Consultancy Sdn Bhd ('MSC') for the sale and purchase of the said property wherein the FIT stood for the purchase price of RM19,970,000. MSC had since obtained adequate financing to complete the purchase and, in fact, the plaintiff had adjudicated and stamped the Form 14A for the transfer of the said property wherein the FIT stood (see exhs 'EPD–10', 'EPD–11', and 'EPD–12' of encl 2). Accordingly, both the plaintiff and MSC proceeded to fulfill their respective obligations to complete the sale and purchase agreement and on 1 December 2004 the solicitors for the bank — Bumiputra Commerce Bank Bhd, by the name of Messrs Bharti Seth & Associates proceeded to present the documents for registration at the Wilayah Land Office. But, on that day — referring to 1 December 2004, it was discovered that the presentation of the relevant documents pursuant to the sale and purchase agreement could not take place because there was a caveat lodged by the defendant on the said property wherein the FIT stood on 24 November 2004. It must be borne in mind that pursuant to the terms of the sale and purchase agreement, the completion date for the whole purchase transaction was on 31 December 2004.

[18] On 8 December 2004, the plaintiff filed an originating summons with a certificate of urgency to remove the private caveat lodged by the defendant. On 31 December 2004, the S1 judge after hearing both the parties — referring to the plaintiff and the defendant, ordered the removal of the private caveat. On 3 January 2005 the defendant filed an appeal to the Court of Appeal against the decision of the S1 judge. It must be emphasised that consequent upon the removal of the private caveat as ordered by the S1 judge, the documents for the transfer of the said property wherein the FIT stood to MSC had been presented at the Kuala Lumpur land office. It was for these reasons that the defendant filed encl 11.

THE STAY APPLICATION

[19] The headnotes to the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257, a decision of the Federal Court, merit reproduction. *It is this (see p 257 of the report):*

> Held, dismissing the application:
>
> (1) An appeal shall not operate as a stay of execution unless the court so orders. The paramount consideration governing an application for a stay of execution is that the appeal to this court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then it should normally direct a stay or grant other appropriate relief that has the effect of maintaining the status quo (paras 7, 10).

(2) There are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if the stay was refused is the most common one. The merits of a party's case in a stay application is not a relevant matter for consideration (paras 18-19).

The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application (para 23).

(3) There was evidence that the applicants had attempted to sell off the lands. Furthermore, the applicants had not put forward reasons that were related to the enforcement of the judgment, instead they had focused on the problems that the applicants would encounter if the motion was not successful (para 24).

[20] *The same sentiments were expressed by me in the case of RHB Sakura Merchant Bankers Bhd v Tan Sri Dato' Ting Pek Khiing (No 2)* [2004] 2 MLJ 315.

[21] *Kosma Palm Oil* was a decision of the Federal Court. It has resolved the conflicting line of authorities preceding it. It confirms the test of '*special circumstances*' and it states that the '*nugatoriness*' of an appeal is a species of the '*special circumstances*' test and not a separate test by itself. So, if the defendant here was able to show that a refusal of the stay would render any further successful appeal nugatory, this would certainly constitute '*special circumstances*'.

[22] I will now endeavour to consider the special circumstances approach advocated, rightly, by the defendant not in its chronological order:

(1) in the event the stay was not granted, a successful appeal would be rendered nugatory;

(2) in the event the stay was not granted, the substratum of the appeal would be destroyed; and

(3) in the event the stay was not granted, the defendant would suffer serious and irreparable damage.

THE FIRST POINT

[23] For fear of repetition, I must state that the order given by the S1 judge was for the removal of the private caveat lodged by the defendant. The appeal by the defendant to the Court of Appeal centered against the S1 judge's order.

[24] In *Kosma Palm Oil*, the Federal Court decided that the key issue was in relation to the enforcement of any judgment and not in regard to the merits of the case. In *RHB Sakura Merchant Bankers Bhd v Tan Sri Dato' Ting Pek Khiing (No 2)*, I had this to say at p 318 of the report:

The emphasis of the nugatory test for determining the stay is not that the appeal would be successful. Rather, a stay is to be granted only if it can be shown that the appeal would be rendered nugatory if it would deprive the defendant of the result of the appeal (*Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126).

[25] *Approaching encl 11 with the facts of the present case, it must be borne* in mind that the said property wherein the FIT stood is located in Kuala Lumpur with the following facilities. Standing on two four (4) storey buildings, the buildings have classrooms, administrative offices, a multipurpose hall, a swimming pool and other related amenities suitable for a college together with the relevant licenses to operate such a college. It was emphasised that it is impossible to find such a college with the required approvals and licenses for sale in Kuala Lumpur. To compound matters further, the defendant had, after having reached an agreement with the plaintiff on the principal terms, increased its enrolment of the students and lecturers and it was said that it is now a nightmare for IIC to juggle its students, lecturers and classrooms within its present premises.

[26] While the plaintiff, on the other hand, had entered into a sale and purchase agreement with MSC in regard to the said property wherein the FIT stood and the plaintiff had gone one step further by presenting the relevant documents at the Kuala Lumpur land office in order to transfer the legal ownership of the said property wherein the FIT stood to MSC. Now, if this transfer is allowed to be registered unimpeded, then a successful appeal would be rendered nugatory because the defendant would not be able to obtain a property of a similar nature as the one at hand having all the necessary approvals and licenses for running a college. It was my judgment, in the context of encl 11, that the defendant has shown that if the stay was not granted, the said property wherein the FIT stood would be legally transferred to MSC together with the licenses thereby putting the precious land and the buildings thereto out of reach of the defendant. That was my judgment and I so hold accordingly.

THE SECOND POINT

[27] Now, if the stay is not granted, and the said property wherein the FIT stood as well as the licenses are legally transferred to MSC, this by itself would defeat the very substratum of the appeal to the Court of Appeal. The key factor that will render any successful appeal nugatory would be the subject matter of the dispute itself. That precious land and the buildings and the licenses thereto. It must be borne in mind that the whole of the appeal to the Court of Appeal centered on the subject matter of the dispute. So, in my judgment, in the context of encl 11, the only remedy available to the defendant would be to secure the subject matter of the dispute — the said property wherein the FIT stood and the licenses thereto, in accordance with the agreement and nothing else. No other remedy in the context of encl 11 would be suitable to the defendant. In *Kho Ah Soon v Ooi Kar Seng (Properties) Sdn Bhd* [1995] 3 MLJ 293 (CA) Shaik Daud JCA aptly said at p 300:

> Land being a valuable and special commodity, once lost, may not adequately be compensated by damages.

[28] In *Perwira Affin Bank Bhd v KI Production Sdn Bhd* [2000] 4 MLJ 652, the court granted a stay pending an appeal against foreclosure and the court stated categorically at p 484 of the report that *'land has a special value, it would render nugatory the decision of the Court of Appeal if a stay was refused'*.

[29] There were averments by the defendant pertaining to the value of the land and the difficulties that the defendant may encounter if the land was disposed off before the defendant's appeal was heard by the Court of Appeal (see the averments in paras 17 to 21 of encl 15). I would, for these reasons, grant the stay as sought for by the defendant.

THE THIRD POINT

[30] In *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49, the Court of Appeal considered '*serious or irreparable*' injury as an example of special circumstances. There the Court of Appeal at p 58 of the report quoted favourably the decision of Yong J, in the case of *Ajaib Singh v Jeffrey Fernandez* [1971] 1 MLJ 139, *in particular the following passage that appeared at p 140 of the Ajaib Singh*'s case:

> After consulting these and other authorities up to the present day, I am of the opinion that an application for stay of proceedings should be made promptly, and it must be proved to the satisfaction of the court that special circumstances exist such as if the stay was not granted, serious or irreparable injury would result to the party applying.

[31] *In the present case at hand, the defendant has alluded to the 'serious or irreparable injury'* that the defendant would sustain if the stay was not granted. Paragraphs 17 to 21 of encl 15 contained the following salient averments. That the defendant had increased its intake of students and recruitment of lecturers in anticipation of its purchase of the FIT college and that it was a nightmare for the defendant to accommodate them in its present premises. That it was next to impossible to find a college of that size and magnitude with the same facilities and the relevant licenses and approvals located in Kuala Lumpur for purchase. All these clearly showed that the defendant had succeeded in showing the existence of special circumstances to warrant a stay.

OTHER RELEVANT ISSUES

[32] Lest I be accused of an oversight, I must now proceed to examine the other related and relevant issues.

[33] The starting point to begin with in any dissertation on a private caveat would be the case of *Eng Mee Yong*. There Lord Diplock in an application for the removal of a private caveat under *s 329 of the NLC aptly laid down the law in these erudite terms (see p 215 of the report)*:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s 327 for removal of a caveat: he must first satisfy the court on the evidence presented to it his claims to an interest in the property does raise a serious question to be tried: and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

[34] In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, Gopal Sri Ram JCA speaking for the Court of Appeal refined the approach set by Lord Diplock in *Eng Mee Yong* by setting out the three stages for the removal of private caveats. I may be forgiven if I were to paraphrase the speech of Gopal Sri Ram JCA in *Luggage Distributors* in this way:

(a) that the caveator has a caveatable interest in the said property;

(b) that on the evidence adduced there is a serious question to be tried; and

(c) that on the balance of convenience (or the balance of justice as Gopal Sri Ram JCA puts it) it would be ideal to maintain the private caveat on the register until the disposal of the action.

[35] Having said that, I will now briefly allude to these three stages in quick succession. But before I do so, I must pay due respect and accord recognition to that brilliant judge in the person of Hashim Yeop Abdullah Sani FJ (later CJ (Malaya)) when his Lordship stated the law in these refined words in the case of *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113 at 115:

> To put it more simply, the caveator in this case must first satisfy the court that he has a 'caveatable interest' in the land. Only if he has such an interest can he qualify to lodge a caveat under s 323 of the National Land Code. In the application to have the caveat removed the onus is cast upon the caveator to satisfy the court that on the evidence presented his claim to an interest in the land raises a serious question to be tried and after having done so he must go on to show that on the balance of convenience the caveat should be extended until the disposal of the main action.

(a) Caveatable interest

[36] It was vigorously argued that the defendant has no caveatable interest in the said property. But it is trite law that the defendant need not have an actual interest in the land for it to have a caveatable interest. An interest that has not arisen yet is sufficient to constitute caveatable interest. The following authorities would suffice to show as to what would amount to a caveatable interest.

[37] In *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263, the then Supreme Court held that a mere 'contractual right' in itself was sufficient to constitute a caveatable interest.

[38] In *Ker Chee Chuan v Katlyn Enterprise (M) Sdn Bhd* [1990] 2 MLJ 91, the High Court held that caveats '*exist for the protection of alleged as well as proved interests*'.

[39] Finally, in *Yeow & Foo Sdn Bhd v Peninsular Rank Sdn Bhd* [1994] MLJU 125, the High Court decided that even if there was no formal sale and purchase agreement, yet there could still be a caveatable interest.

(b) Serious issues to be tried

[40] This was the basis of the Privy Council's case of Eng Mee Yong. In that case, the issue was in regard to an extension of time of an agreement and the judge held that the defendant's affidavits were insufficient to raise triable issues. There the defendant tried to rely on oral evidence in order to prove the extension of time but such an evidence would run counter to ss 91 and 92 of the Evidence Act 1950.

[41] Here, in the present case, the facts were entirely different. Here, the defendant had adduced affidavit evidence which was qualitatively different from the case of Eng Mee Yong and, based on the current law, whatever doubts that existed should be resolved at the trial proper. The affidavits that were filed showed conflicting material facts. A classic example was the issue pertaining to the licence, in particular, whether the licence was an agreed term in the sale and purchase agreement. There were also conflicting interpretations advanced by both parties in regard to the contents of the letters which cannot be resolved without a full fledged trial. Witnesses should be called and be examined.

[42] It must be recalled to mind that Lord Diplock in *Eng Mee Yong* aptly said that '*if there appears to be any conflict of evidence which is not on the face of it implausible, such a conflict ought not to be disposed of on affidavit evidence only*'. This was also the approach adopted by our Supreme Court in *J Raju v Kwong Yik Bank Bhd & Anor* [1994] 2 MLJ 408.

[43] The law in regard to the removal of a private caveat is well settled. It has been crystallised and accepted by everyone based on the decision of the Privy Council in *Eng Mee Yong*. The law may be stated in this way and I must be forgiven for reiterating it once again. That the caveator must first satisfy the court that he has a caveatable interest and that on the evidence, his claim to an interest in the property raises a serious question to be tried. Next, the caveator must show that on the balance of convenience, it would be far better to maintain the status quo until the trial of the action. In this way, the caveatee will be prevented from disposing of the said property to some third party. Now, in the context of the present case, the third party would be MSC.

[44] I need to refer to three other authorities.

[45] The first would be the case of *Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd* [2003] 3 MLJ 152, a decision of the Court of Appeal which held that in a situation of a conditional contract and if there was a dispute in regard to the terms of the agreement then this was said to be a bona fide triable issue.

[46] This would be followed by the case of *Kumpulan Sua Belong* where the then Supreme Court held that a caveator has only to show a prima facie case that his claim was not frivolous and that in such circumstances the court will not summarily remove the caveat.

[47] Finally, it would be the case of *Bank Utama (M) Bhd v Periamma a/p Vellasamy* [2002] 7 MLJ 250 where the court held that the reason for the removal of the caveat was to enable the land to be sold and this by itself constituted a serious question to be tried.

(c) Balance of convenience

[48] I perceive the law to be this. That once a caveator can show a caveatable interest and that there are serious issues to be tried, then the balance of convenience would lie with the retention of the private caveat. The balance of convenience would ensure that the status quo is maintained pending the hearing of the case (*Ramalingam a/l Rasaratnam v Sellam w/o Nadarajan* [2004] 6 MLJ 182).

[49] Here, the defendant has explained as to why there was a need to purchase the said property. I need not dwell on it at length. Suffice for me to say that the defendant's explanations were acceptable. The said property wherein the FIT stood together with the relevant licenses were certainly a precious commodity. In sharp contrast, the plaintiff was merely concerned with pecuniary profit. The sale to MSC would benefit the plaintiff an additional sum of RM3.4 million. The balance of convenience must surely fall in favour of the defendant.

[50] I must proceed further and I must consider the following issues:

THE TIME FACTOR

[51] The plaintiff raised the issue of delay. Now, it cannot be denied that delay would be a relevant factor. But, in the context of this case, the delay was caused by the plaintiff and not the defendant. It was the stand of the defendant that it was the plaintiff who had been shifting its position by refusing to acknowledge the transfer of the licence.

[52] In *Kumpulan Sua Betong*, the Supreme Court was of the view that the delay in lodging the caveat was an insignificant consideration and that it would not affect the balance of convenience. Here, the defendant stated in its affidavit that the writ for the claim of specific performance was forthcoming and that it would be filed in due course. In *Tan Suan Heoh v Lim Teck Ming & Ors* [1987] 2 MLJ 466, Edgar Joseph Jr J allowed a caveat to remain provided the proceedings would commence within one month '*from the date of determination of the application*' (see p 470 of the report).

ESTOPPEL

[53] The plaintiff's conduct has caused the defendant to believe that the sale was going to proceed and that the license was an integral part of the deal. Having induced the defendant to pay the deposit and having agreed to the principal terms of the agreement and after representing that the sale would include the license, the plaintiff now resiled from its commitment. Of course, the defendant having placed its reliance on the plaintiff's promises, now has suffered great detriment. The defendant has increased its enrolment of students and recruitment of lecturers in anticipation of the purchase and has taken the necessary steps to commence its courses at the FIT college. All these facts would give rise to an estoppel and the plaintiff should be prevented from resiling from its obligations. In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, the Federal Court explained the principles of estoppel in lucid language and applying the law as set out therein to the facts of the present case it can be said that the defendant was influenced by the representations and the conduct of the plaintiff and so it would now be unconscionable for the plaintiff to remove the private caveat which protected the defendant's legitimate rights in this matter.

[54] It may well be argued on behalf of the plaintiff that it was too late in the day to maintain the status quo as the private caveat had already been removed and the transfer documents had already been presented at the land office. My short answer would simply be this. That notwithstanding all that, this court was minded to grant the stay so that the status quo would be maintained until the disposal of the suit. It must be borne in mind that the presentation of the transfer document does not and cannot mean the registration of the transfer. It must be emphasised that legal transfer takes effect only upon registration. If the stay was granted then the Registrar of Titles can be directed not to effect registration of the transfer. In *Kosma Palm Oil*, the Federal Court speaking through Augustine Paul JCA referred to the decision of Gopal Sri Ram JCA in *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598, in particular to p 610 where Gopal Sri Ram JCA said this:

> If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the status quo.

[55] *I was asked, in the context of encl 11, to grant 'other appropriate interim relief that has the effect of maintaining the status quo'.* I was more than willing to do so. In fact, I was amenable to grant encl 11 and I did just that. I also gave other ancillary reliefs.

[56] If the stay was not granted, the very substratum of the case would be transferred to MSC — the third party. And if that were to happen any successful appeal against the decision of the S1 judge would not be enforceable

and would be rendered nugatory. It would also result in a serious and irreparable injury to the defendant. In the event there was any harm sustained by the plaintiff it was capable of being compensated by way of damages. Indeed if the appeal was unsuccessful, the plaintiff could easily be compensated by way of damages. All these factors constituted special circumstances warranting a stay.

NO FORMAL SALE AND PURCHASE AGREEMENT

[57] Now, although there was no formal sale and purchase agreement being executed between the parties, yet there was a contract in existence.

[58] The scenario was like this:

(a) the plaintiff made an offer together with the initial terms and conditions thereto (see exh 'EPD–2' of encl 2);

(b) monies in the sum of RM330,000 were paid by the defendant and received by the plaintiff and it was later forfeited by the plaintiff;

(c) all these when taken together resulted in the formation of a contract between the plaintiff and the defendant; and

(d) the issue of the license was the term that the plaintiff refused to incorporate into the agreement.

[59] It was submitted on behalf of the plaintiff that the requirement of the license was an afterthought. With respect, the license issue was a live issue and it started at the very commencement of the negotiations between the parties. One must not lose sight of the fact that the advertisement as exhibited in exh 'SKH–8' of encl 15 and as reproduced in the early part of this judgment must be read not only by reference to its title but also in its full context. It may be questioned as to the meaning behind the words '*facilities approved for educational purposes'?* In answer, it may be said that those words must be read in its correct perspective and must be read in the context of the sale of the said property wherein the FIT stood together with the relevant licenses. In other words, the offer was not limited to the physical part of the subject matter –- referring to the land, the buildings wherein the FIT stood, but also to an approval from an external source going to the very character of the subject matter and that was this: that it was licensed for educational purposes. The plaintiff's solicitors have not advanced an alternative interpretation to those words. Indeed if it was only for the sale of the land and the buildings wherein the FIT stood, then why must the words *'facilities approved for educational purposes' appeared in the advertisement?* Exhibits 'SKH–9' and 'SKH–10' that were annexed to encl 15 clearly showed that the issue of the license surfaced as far back as 16 June 2003. Even if the plaintiff disputed receiving the letter dated 16 June 2003, then the issue of the license surfaced in the plaintiff's own letter dated 17 June 2003 as per 'SKH–10' of encl 15. Thus, it was erroneous on the part of the plaintiff

to say that the issue of the license was raised later by the defendant as a mere afterthought. It was the plaintiff who later resiled from its position vis-a-vis the advertisement which precipitated the entire dealings between the parties. It was part and parcel of my judgment that the license was a live issue being the genesis of the transaction between the parties.

[60] When the first draft agreement came, it was conveniently marked as the '*final draft*' (see exh 'EPD–5' of encl 2). The choice of the phrase '*final draft*' was entirely that of the plaintiff and it showed the state of mind of the plaintiff. It was like a '*take it or leave it*' situation bearing in mind that the part payment of RM330,000 was already in the bag under the guise of the forfeiture clause. And when the defendant's solicitors raised the issue of the relevant licenses, it was immediately shot down, so to speak, as a 'new' term (see exh 'EPD–7' of encl 2).

[61] Now, the plaintiff adopted a new stand. That as a matter of law, the relevant licenses were not transferable. It was also the stand of the plaintiff that the defendant ought to be fully aware of all the legal and procedural requirements of the Ministry of Education pertaining to the relevant licenses. Now, I pause here to observe. If that was the case, why did the plaintiff even enter into discussions with the defendant in regard to those licenses? The plaintiff could simply have said, at the outset, that those licenses were not transferable.

[62] The plaintiff had the audacity to say that there was no contract but yet proceeded ahead and forfeited the part payment of the defendant amounting to RM330,000. Even assuming for a moment that those licenses were not transferable, which meant that the parties were not ad idem (where the defendant wanted those licenses and the plaintiff could not transfer those licenses), then the only logical thing for the plaintiff to have done was to return the part payment of RM330,000 and call off the transaction. Here, the plaintiff by its action of forfeiture of the part payment, in fact affirmed that there was a contract when the defendant did not perform its obligations.

[63] In *Yeow & Foo Sdn Bhd v Peninsular Rank Sdn Bhd*, the court there held that the plaintiff was not entitled to forfeit the deposit if the plaintiff claimed that there was no contract.

[64] In *Kho Ah Soon v Ooi Kar Seng (Properties) Sdn Bhd* there was no executed sale and purchase agreement. Both the vendor and the purchaser agreed on all the salient terms. However, they could not agree on the commencement date of the '*agreement*'. Due to that disagreement, the vendor informed the purchaser that he did not wish to proceed with the sale. Despite this, the purchaser's solicitors forwarded a draft sale and purchase agreement to the vendor's solicitors and the purchaser further deposited 10% of the purchase price with his own solicitors. The vendor insisted that he did not wish to proceed and the agreement remained unexecuted. The purchaser then lodged caveats.

Before the court, there was the usual argument that there was no concluded contract. But Siti Norma Yaacob JCA (now Chief Judge of Malaya) held that the purchaser had shown a caveatable interest and Shaik Daud JCA went on to hold that the issue of whether there was a concluded contract itself gave rise to a serious issue to be tried.

[65] Now, whether there was a contract or not was entirely a matter to be determined at the trial. Trial by affidavit evidence was not sufficient. The defendant said that there was a binding contract notwithstanding that no formal sale and purchase agreement was signed between the parties. But the plaintiff said otherwise.

SPECIAL CIRCUMSTANCES DISCLOSED IN ENCL 15

[66] Briefly, encl 15 contained the following averments:

(a) at para 8, the description of the FIT college was set out;

(b) at para 11, the preparations made by the defendant were set out;

(c) at para 18, the impossibility of finding another college was set out;

(d) at para 19, that the FIT college would move out of the reach of the defendant if the private caveat was removed was averred; and

(e) at para 20, the substratum of the defendant's appeal to the Court of Appeal would be destroyed was categorically stated.

[67] All these must surely constitute special circumstances. It was submitted that the plaintiff's counsel has mistaken nugatoriness and special circumstances with the issue of merits. The matters before this court concerned the effect which a denial of the stay would have on the enforcement of any successful appeal. If the said property wherein the FIT stood and the relevant licenses were sold to MSC and the appellate court finds that the removal of the private caveat was wrong, how could the defendant enforce the judgment of the appellate court? Nugatoriness was certainly not an issue of merit, but rather it was an issue pertaining to how useful a successful appeal would be to the defendant.

[68] The plaintiff relied on the case of *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 4 MLJ 259, a decision of the High Court which held that caveats should not be enforced on commercial properties on account that money would be an adequate remedy. But, with respect, this High Court decision was inconsistent with the weight of authority. It was not at tandem with the Court of Appeal case of *Kho Ah Soon v Ooi Kar Seng (Properties) Sdn Bhd* which, inter alia, placed a high premium on land. There is also a presumption in s 11(2) of the Specific Relief Act 1950 that in cases of transfer of an immovable property, money is not an adequate compensation. For all intents and purposes the said

property was not a 'commercial property'. It has been approved for educational purposes and therefore 'special'. It must be emphasised that not many buildings in Kuala Lumpur would satisfy these criteria.

THE PLAINTIFF CLAIMED THAT THE DEFENDANT DID NOT HAVE A CAVEATABLE INTEREST

[69] An argument along these lines would be an argument in relation to the merits of the appeal and this was certainly irrelevant to the issue of a stay. The plaintiff went on the erroneous basis that a caveatable interest would only arise after a concluded sale and purchase agreement had been executed. But on the authorities as alluded to somewhere in this judgment, the fact that a deposit was paid was said to be sufficient to give rise to a caveatable interest even though no contract was concluded (*Yeow & Foo Sdn Bhd v Peninsular Rank Sdn Bhd*).

THAT THE LICENCE WAS NOT TRANSFERABLE ACCORDING TO THE PRIVATE HIGHER EDUCATIONAL INSTITUTIONS ACT 1996 ('1996 ACT')

[70] The learned counsel for the defendant submitted that if the plaintiff had read the 1996 Act and said that the licenses were not transferable, it meant that either the plaintiff was, at the outset, ignorant of this fact or that it had made negligent or fraudulent misrepresentations to the defendant when the plaintiff referred to the licenses in exhs 'SKH–8' and 'SKH–10' of encl 15. The question to pose would then be, according to the learned counsel for the defendant, that if the plaintiff knew as to the non-transferability of the relevant licenses why then did the plaintiff lead the defendant into believing that the relevant licenses could be transferred? That was indeed a pertinent question.

[71] It was the submission of the learned counsel for the defendant that the 1996 Act contains no stipulation that an educational license is not transferable. The learned counsel for the plaintiff referred to ss 6, 7, and 19 of the 1996 Act but these sections do not bar the transfer of a license. In fact, s 19 of the 1996 Act suggests that such a transfer is possible provided the approval of the Minister is obtained. That was the reason behind the defendant's solicitor's letter in exh 'SKH–5' of encl 5 which craved the indulgence of the plaintiff to incorporate the transfer of the licence to the defendant. That letter was worded in this way:

> to add in the clause regarding the duty of the vendor with regards to the transfer of the FIT permit to the purchaser.

THE INABILITY OF THE DEFENDANT TO RAISE FUNDS

[72] This was an irrelevant consideration in adjudicating encl 11. Both Shaik Daud JCA and Siti Norma Yaacob JCA (now Chief Judge of Malaya) in *Kho Ah Soon v Ooi Kar Seng (Properties) Sdn Bhd* held that questions of financial

ability cannot be used to deprive a caveator of his caveatable interest. In fact, Siti Norma Yaacob JCA (now Chief Judge of Malaya) went on to say that *'itwas not for the courts to question his finances' as 'the proceedings were only for the protection of the land'*.

[73] At any rate, common sense must prevail. No one can obtain a loan from any financial institution until and unless a formal sale and purchase agreement is signed. The impasse in this case was due to the licence issue. It was in no way connected to the defendant's financial standing. Another factor which must be borne in mind would be this. That the plaintiff wanted an irrevocable letter of undertaking from a bank even without a formal agreement in place. This was indeed a tall order and no bank would issue an irrevocable letter of undertaking without a concluded agreement.

Eng Mee Yong

[74] Lord Diplock in *Eng Mee Yong* laid down the following principles of law when delivering the judgment of the Privy Council (see p 215 of the report):

> In their Lordship's view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (ie the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as prima facie evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so.
>
> It is otherwise when the applicant under s 327 is someone other than the caveatee. He has no registered title to rely upon as prima facie evidence of his interest in the land. It is for him to begin by satisfying the court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

[75] *In a situation where the application for the removal of a private caveat* is by an applicant with registered interest, s 327(1) of the NLC stipulates that it is not necessary for the applicant to show that he has a registered interest or interest affected by the existence of the private caveat. Lord Diplock in *Eng Mee Yong* stressed that the procedure in s 327(1) of the NLC is available to any person aggrieved by the existence of a private caveat and this is so whether or not he has a registered title or interest in the land. *Section 327(1) of the NLC enacts as follows*:

> Any person or body aggrieved by the existence of a private caveat may at any time apply to the court for an order for its removal, and the court (acting, if the circumstances so require, ex parte) may make such order on the application as it may think just.

[76] *According to Lord Diplock in Eng Mee Yong, where the applicant is the* caveatee — being the registered proprietor of the land, the onus lies on the caveator to satisfy the court that on the evidence the private caveat ought to remain on

the register pending the trial of the action. At this juncture, it is also ideal to refer to the case of *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 at pp 146 to 147. Now, it is unnecessary for the caveatee to show that he is aggrieved by the existence of the private caveat because the caveatee can safely rely upon his registered title as prima facie evidence of his unfettered legal right to deal with the land as he pleases. It must be emphasised that Lord Diplock in *Eng Mee Yong* used the word 'caveatee' in reference to the registered proprietor of the land because his Lordship was dealing with an application by the registered co-proprietors for removal of a private caveat lodged against their land by the respondent.

[77] In *Eng Mee Yong* too, Lord Diplock also laid down the principle that where the applicant for the removal of the private caveat under s 327(1) of the NLC is someone other than the caveatee — referring to an applicant without registered title or interest, the onus is on the applicant and not the caveator to satisfy the court that he is a person aggrieved by the existence of the private caveat. This is quite logical because the applicant has no registered title to rely upon as prima facie evidence of his interest in the land. At the very least, the applicant must be able to prove that he has the locus standi to apply for the removal of the private caveat under s 327(1) of the NLC. And the applicant can do so by showing that he is aggrieved by the existence of the private caveat as required by s 327(1) of the NLC. And where the applicant fails to satisfy the court, the private caveat entered by the caveator will remain on the register. So it can be surmised that the onus which lies upon an applicant who is not the caveatee (the word used by Lord Diplock in *Eng Mee Yong* to describe the registered proprietor of the land) is distinct and separate from the onus that would lie upon the caveator. All the applicant needs to prove is that he is an aggrieved party.

[78] It is germane to mention that before *Eng Mee Yong*, the decision of the then Federal Court in *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 was relied upon when dealing with an application for the removal of a private caveat under s 327(1) of the NLC. In *Macon Engineers*, one has to ask whether the caveator has a caveatable interest. If the answer is in the negative, then the private caveat must be removed. But if the answer is in the affirmative, the caveator must then proceed to show that his claim is not frivolous or vexatious.

[79] In 1992, with the arrival of *Kumpulan Sua Betong*, a decision of the then Supreme Court, the law changes (see p 270 of the report of *Kumpulan Sua Betong*):

> it would be more efficacious to apply both the traditional approach adopted in the *Macon Engineer*'s case and Lord Diplock's guidelines as stated in *Eng Mee Yong*'s case.

[80] *This means that the caveator must establish that he has a caveatable interest* in the land and he must then show that his claim does raise a serious question to be tried and that, on the balance of convenience, the private caveat ought to remain.

[81] It is now ideal to say something about *Kumpulan Sua Betong*.

Kumpulan Sua Betong

[82] I may be forgiven if I were to briefly narrate the facts of the case.

[83] In that case, the appellant had in 1980 agreed to sell a parcel of land known as Lot 849 to Ezan Sdn Bhd. Clause 2 of the sale and purchase agreement stipulated that the sale was conditional upon the estate land board either certifying that the sale was not affected by s 214A of the NLC or upon approval of the estate land board being given. Section 214A of the NLC enacts that no estate land shall be transferred to two or more persons without the approval of the estate land board. Section 214A(11) of the NLC defines '*estate land*' to mean agricultural land held under one or more than one title the area or the aggregate area of which is not less than 40 hectares and the lots constituting such area are contiguous. Later, Ezan Sdn Bhd sold the land to the respondent. The land was duly registered in the name of the respondent in 1981 without any objection from the appellant. But in 1987 the appellant wrote a letter to the respondent objecting to the transfer on the ground that the approval of the estate land board had not been obtained. The appellant swiftly instituted an action for a declaration that the registration of the transfer without the approval of the estate land board was null and void as well as for an order that the register be rectified by the reinstatement of the appellant as the proprietor. On 8 November 1989, the appellant entered a private caveat against the land in order to preserve the status quo of the parties pending the determination of the civil suit.

[84] By way of an application by the respondent under s 327 of the NLC, the High Court ordered the removal of the private caveat on the following grounds:

(a) that s 214A of the NLC merely made it an offence to transfer without the prior approval of the estate land board and that it did not have the effect of rendering a transfer in contravention of s 214A of the NLC null and void;

(b) that since the appellant had already been paid the purchase price, the appellant no longer had any caveatable interest in the land; and

(c) that there was an inordinate delay in entering the private caveat without any reasonable explanation for the delay.

[85] On appeal, by a majority, the Supreme Court allowed the appeal. Jemuri Serjan CJ (Borneo) speaking for the majority held that the appellant was a body claiming title to the land and that on the basis that an offence would have been made out under s 214A (10A) of the NLC which could have the effect of invalidating the transfer to the respondent, the appellant's claim was said to be neither frivolous or vexatious. On the balance of convenience, the majority held that the private caveat should be allowed to remain.

[86] Jemuri Serjan CJ (Borneo) observed that there were two approaches. The traditional approach as exemplified by the case of *Macon Engineers* and '*the more recent but quite different approach*' in *Eng Mee Yong*. In style, Jemuri Serjan CJ (Borneo) said at p 267 of the report in *regard to the traditional approach or the pre-Eng Mee Yong's approach in this way*:

> ... whether the caveator has a caveatable interest which terms are not defined in the National Land Code 1965, by applying to him para (a) of sub-s (1) of s 323 of the Code. The relevant question which the court should address itself to is: Is the appellant a person claiming title to, or registrable interest in any alienated land, or any right to such title or interest? If it is not, that ends the matter and the caveat cannot be allowed to remain. The factual matrix of the claim to be a person or body within the purview of para (a) of the subsection must be minutely considered by evidence to establish that the claim is not frivolous or vexatious.

[87] *And to illustrate how the approach works, his Lordship Jemuri Serjan CJ (Borneo)* referred to two cases. The first was *Macon Engineers* case and the second was *Mahadevan & Anor v Patel* [1975] 2 MLJ 207, a decision of Suffian LP.

[88] The facts in *Macon Engineers* may be stated as follows. On 9 July 1973, the respondent entered into a sale and purchase agreement to purchase a piece of land. The respondent failed to complete the contract on the ground that at the time of the agreement and on the completion date, the vendor was not the registered owner of the land. On 25 June 1974, the respondent filed an action against the vendor for specific performance. On 21 November 1974, the respondent entered a private caveat against the land. On 15 June 1974, the proprietor sold the land to the appellant because the respondent has failed to complete the contract. In an application to remove the private caveat, the issue advanced was whether the respondent had any caveatable interest as he had only contractual rights which were non-statutory and non-registrable. All the three judges of the then Federal Court comprising of Gill CJ (Malaya), Ali and Raja Azlan Shah FCJJ held that a claim to an interest in land arising under a contract was sufficient to support a private caveat. It was further held that as there was an issue as to whether the contract between the vendor and the respondent was rightly terminated, the private caveat should be allowed to remain on the register until the resolution of the matter.

[89] I will now briefly state the facts of the case of *Mahadevan & Anor v Patel*. There the respondent entered a private caveat against the land on the basis that a charge was to have been created in his favour as security for a loan which he had granted. The appellants disputed the right of the respondent to enter the private caveat because the loan was granted not by the respondent but rather by the company of which the respondent was the managing director. Suffian LP held that it was proper for the respondent to lodge the private caveat and that it was also right for the private caveat to remain until the disposal of the suit pending between the company and the appellants.

[90] Still on the case of *Kumpulan Sua Belong*, Jemuri Serjan CJ (Borneo) proceeded to discuss the principles of *Eng Mee Yong* and his Lordship then compared it with *Macon Engineers* and *Mahadevan* and his Lordship further compared it with the New Zealand's case of *Re Faulke's Caveat* (1906) 26 NZLR 392 *and his Lordship then summed up the matter in these erudite words (see p 270 of the report)*:

> The two approaches may be different but the ultimate object is to determine whether a caveator, in order to maintain his caveat in force, has a claim to a title or interest in alienated land, or any right to such title or interest, although it must be said for the earlier approach that it is a direct one and easy to apply.

[91] *Put bluntly, the traditional approach is mainly concerned with the* question of whether the caveator has a caveatable interest within the meaning of s 323(1) of the NLC. The *Eng Mee Yong*'s approach according to Jemuri Serjan CJ (Borneo) was concerned with the existence of a serious question to be tried and the discretion of the court to remove the caveat from the register or to allow the caveat to remain. Now, although the traditional approach was '*a direct one and easy to apply*' (to borrow the words of Jemuri Serjan CJ (Borneo)), yet the majority of the Supreme Court preferred to apply both the approaches. Now, we have advanced a step further. We now have a three stage approach and it may be stated in this way:

(1) whether the caveator has a caveatable interest within the meaning of s 323(1) of the NLC?;

(2) whether the caveator's claim does raise a serious question to be tried?; and

(3) whether, on the balance of convenience, it would be better to allow the caveat to remain until the trial of the action?

[92] I can safely say that the Supreme Court in *Kumpulan Sua Betong* rightly reviewed the law relating to the removal of a private caveat and in doing so it examined the position prior to and after *Eng Mee Yong* and it finally established the now famous three-stage approach.

CONCLUSION

[93] For the reasons as adumbrated above, I gave the following orders:

(1) I granted a stay of the enforcement and operation of the order given by the S1 judge on 31 December 2004 pending disposal of the appeal to the Court of Appeal against his Lordship's order.

(2) I also granted an order that the Registrar of Titles, Wilayah Persekutuan be directed not to effect the transfer of the legal ownership of the property held under HS (D) No 83192 Lot No 12734 in the Mukim and District of Kuala Lumpur to MSC or its nominee.

(3) I too made an order that the defendant to file the suit in this court within a month from today (17 January 2005) and that the trial of that suit is to be expedited.

(4) I made a further order that the costs of the application in encl 11 be costs in the cause.

Application allowed.

Reported by Loo Lai Mee